IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date:06.09.2006

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Writ Petition No.24701 of 2006
and W.P.M.P.Nos.1 & 2 of 2006

J.Patrick ... Petitioner

Vs.

1. Government of Tamil Nadu,
Rep.by its Secretary,
Home (Pol.VI) Department,
Fort St.George,
Secretariat, Chennai 9.

2. Director General of Police,
Chennai 4.

3. Additional Director General of Police (L&O)
Chennai 4.

4. Deputy Inspector General of Police,
Vellore Range, Vellore.

5. The Superintendent of Police,
Vellore District, Vellore. ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India for the issuance of a Writ of Certiorarified Mandamus, directing in the form of writ to call for the records inconnected with proceedings issued in D.O.604/2004 and 605/2004 Rc.No.H1(2)/P.R.80/2004 dated 07.06.2004 passed by the 5th respondent, C.No.B2/AP.38/2004 dated 12.07.2004 passed by the 4th respondent Rc.No.758/225985/ PR.II(2)/2004 dated 19.05.2005 passed by the 3rd respondent, Rc.No.565/140244/Ap.2(2)/2005 dated 22.10.2005 passed by the 2nd respondent and G.O.(2D) No.321 dated 18.05.2006 passed by the first respondent and quash the same and consequently direct the respondents to reinstate the petitioner into service with all benefits.

For Petitioner : Mr.S.Ilamvaludhi
For Respondents : Mr.Edwin Prabakhar, G.A.

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O R D E R

This writ petition is filed challenging the proceedings of the 5th respondent dated 07.06.2004 followed by the proceedings of the 4th respondent dated 12.07.2004 and subsequently by the order of the 3rd respondent dated 19.05.2005 followed by the order of the 2nd respondent dated 22.10.2005 and ultimately by the first respondent in G.O.(2D)No.321 dated 18.05.2006 and for a direction to the respondents to reinstate the petitioner in service.

2. The petitioner while working as Police Constable in Nemili Police Station was issued a charge memo by the Superintendent of Police, Vellore, namely the 5th respondent dated 13.05.2004 stating that the petitioner has not attended duty for more than 21 days without prior permission from the higher authorities. In respect of the said charge considering the defense of the petitioner who had stated that he was suffering from heart ailments and therefore he has become unconscious and directed one of his relatives to communicate the same to the higher authorities, who had not done the same and he was not mentally well and therefore requesting for taking lenient view, the Enquiry Officer found that if really he was not well he should have proof for having treatment and sent the same to the higher authorities. The medical report submitted by the petitioner on 19.04.2004 shows that it was submitted much after the disciplinary proceedings initiated, which cannot be accepted and has found the said charge against the petitioner as proved. The Deputy Superintendent of Police being the Enquiry Officer, submitted his report to the 5th respondent. The 5th respondent accepting the same, based on the enquiry report forwarded a copy of the same by undated letter of May 2004 but signed on 24.05.2004 calling for any representation in respect of the enquiry report within 15 days from the date of receipt of the said memo.

3. Thereafter, the 5th respondent by the impugned order dated 07.06.2006 has passed the order of punishment of dismissal from service. Aggrieved by the same the petitioner has filed an appeal before the Deputy Inspector General of Police namely the 4th respondent who by an order dated 12.07.2004, while conforming punishment, modified the punishment as that of compulsory retirement. Again aggrieved by the said order, the petitioner has filed the review petition before the Additional Director General of Police, Law and Order, viz., the third respondent who on 18.10.2004 by the order dated 19.05.2005, relying upon the fact that the Enquiry Officer has held that the charges are proved and therefore, the review petition was rejected. It was as against the order of the third respondent, the petitioner has approached the second respondent by way of mercy petition dated 27.06.2005, who by his order dated 22.10.2005 has also rejected the same. Ultimately, the petitioner has filed a petition to the first respondent-the Government on 30.11.2005 and the Government has passed the impugned order dated 18.05.2006 rejecting the appeal of the petitioner and in the circumstances the petitioner has filed the present

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writ petition challenging all the orders of punishment on various grounds including that the order of punishment of dismissal was passed by the 5th respondent without even waiting for 15 days time from the date of showcause notice which was undated but the signature of the 5th respondent was affixed on 24.05.2006.

4. According to the petitioner even assuming that the said showcause notice was served on the very next day, the impugned order of the dismissal passed by the 5th respondent on 07.06.2004 is before the expiry of 15 days and therefore, it should be held invalid. It is the further case of the petitioner that even the Enquiry Officer has decided that the entire issue, with a preconceived notion, which is evidence from the perusal of the enquiry report itself, wherein the Enquiry Officer himself has confused the defence made by the petitioner and instead of finding his report he has given a decision as if the petitioner is punishable for the charges. In fact the Enquiry Officer has categorically stated that he has held the charge proved. Therefore, according to the petitioner it is preconceived in its nature.

5. It is also the case of the petitioner that the explanation submitted by the petitioner has not been considered at all, especially in the circumstance that it relates to the ailment of the petitioner due to which he was unable to communicate his absence and which was sent through one of his relatives who had failed to intimate the same. The finding of the Enquiry Officer as if the explanation submitted by the petitioner is an after thought and is again pre conceived one. The 5th respondent mechanically, without considering anything has passed the order of dismissal from service without assigning any reason and the order is a four line order and therefore, it is basically opposed to the principle of natural justice and passed without application of mind. Further the Appellate Authority has not considered anything about the defence stated by the petitioner. Further, for the charge memo issued under Rule 3B of the Tamil Nadu Police Subordinate Service Rules 1965, dismissal, removal or compulsory retirement cannot be granted unless it is a charge under Rule 3A.

6. Mr.S.Elamvaluthi, learned counsel appearing for the petitioner, would contend that the entire proceedings of the Enquiry Officer is vitiated by malafide and preconceived notion and therefore, it should be held as invalid in the eye of law, especially in the circumstance that it is not open to the Enquiry Officer to come to a conclusion as if the explanation submitted by the petitioner is motivated. Further the Enquiry Officer has confused the defence statement to come to a conclusion against the petitioner. It is also the contention of the learned counsel for the petitioner that the 5th respondent being the original authority to pass order of punishment, based on the enquiry report, having given a showcause notice by enclosing the enquiry report which is undated but signed on 24.05.2006 ought to have waited for the said 15 days time given under the said notice before passing the impugned order of dismissal from service

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dated 07.06.2004. It is admittedly passed before the expiry of 15 days, which has been given under the showcause notice. The learned counsel would also contend that even assuming otherwise, the impugned order of dismissal passed by the 5th respondent suffers from illegality inasmuch as it has not given any independent reasoning for arriving at any such conclusion and a reading of the impugned order of the 5th respondent dated 07.06.2004 would show that it is a single line order without application of mind.

7. It is in these circumstances, the learned counsel would further submit that the Appellate Authority and other Authorities namely the other respondents before whom the mercy petition was filed mechanically passed the order rejecting the said petition without even considering the basic defects in the entire disciplinary proceedings. Therefore, according to the learned counsel the entire proceeding is vitiated.

8. In any event the learned counsel also further submit that when the charge is that the petitioner had absented himself for 21 days from attending duty without assigning any reason, the punishment of dismissal and subsequent modification of the same as that of compulsory retirement is grossly and shockingly disproportionate to the charge framed against the petitioner.

9. The learned counsel has placed reliance on the various judgments of the Honble Apex Court including JT 2004 (7) SCC 576, 1996 (7) SCC 634, AIR 1994 SC 215 and AIR 1999 SC 3367 to show that in cases where the punishment awarded is disproportionate to the charge, the court can set aside the same or modify the punishment based on the facts and circumstances of the case.

10. On the other hand Mr.Edwin Prabakar, learned Government Advocate would submit that as far as the case of the petitioner is concerned it was not an isolated case of desertion for 21 days but he was in the habit of deserting habitually and he has also approached the Tamil Nadu Administrative Tribunal earlier, when orders were passed.

11. It is the further case of the learned Government Advocate that the original order of punishment passed by the 5th respondent was dated 24.05.2004 and in fact that was received by the petitioner on 25.05.2004 and he has also given a reply on 25.05.2004. Therefore, according to the learned Government Advocate there was no question of respondent waiting till the end of 15 days as given in the showcause notice as the petitioner has himself submitted his explanation on 25.05.2004 itself.

12. I have considered the rival submissions made by the learned counsel for the petitioner and also the learned Government Advocate for the respondents.

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13. As far as the contention of the learned counsel for the petitioner, that the 5th respondent having given a showcause notice on 24.05.2006 wherein by giving 15 days time, he ought to have waited till the end of 15 days from the date of receipt of the said showcause notice issued to the petitioner and in the present case the petitioner has in fact received the showcause notice on 25.05.2006 and therefore, even before completion of 15 days, the order of punishment came to be passed by the 5th respondent on 07.06.2005 deserves to be considered first.

14. When the learned Government Advocate has specifically stated that the petitioner having received the showcause notice issued by the 5th respondent on 24.05.2004 has in fact submitted his explanation on 25.05.2004 itself which fact has not been denied by the learned counsel for the petitioner, I do not think that any useful purpose will be served on the fifth respondent to wait till 15 days. The period of 15 days time is given to the petitioner for the purpose of submitting his explanation to the showcuase notice and it is not an empty formality. Since the petitioner has given his explanation on 25.05.2004, I do not think that the contention of the learned counsel for the petitioner that the original order of punishment passed by the 5th respondent was with any motive. Therefore the said contention is not tenable.

15. Now coming to the next point about the proportionality of the punishment awarded to the petitioner when considering the nature of charge framed. In the present case the charge framed against the petitioner is that he has deserted the job for a period of 21 days without obtaining leave from the higher authorities that is from 13.01.2004 to 03.02.2004. An enquiry was admittedly conducted and in fact an enquiry report was submitted. It was dated 13.05.2004. Even though it is stated that there is discrepancy in the enquiry report and the enquiry officer has preconceived the entire idea of giving punishment on the basis that he has not considered the defence statement of the petitioner in a proper perspective, I do not think that there is any serious irregularity in the enquiry report especially in the circumstance that admittedly the enquiry report was forwarded to the petitioner and he was directed to submit his note about the enquiry report as stated in the showcause notice of the 5th respondent dated 24.05.2004 for which the petitioner has in fact given his note by way of explanation on 25.05.2004. However, the 5th respondent as original authority has passed the order of dismissal from service on 07.06.2004 which was subsequently reduced as one of compulsory retirement by order dated 12.07.2004 passed by the Appellate Authority namely the 4th respondent and the same has consistently been confirmed by the other authorities namely the Revision Authority as also the Mercy Petition and ultimately by the government.

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16. Therefore, the fact remains that as far as the procedure followed for the purpose of conducting enquiry is concerned there is no much discrepancy. But only thing to be considered in this case is as to whether for the charge of abstaining for 21 days and more without obtaining proper leave from the higher authority, the punishment of compulsory retirement is proportionate to the said charge or as to whether the punishment imposed by the 5th and 4th respondents for dismissal and compulsory retirement respectively for the said charge is shocking to the conscience. It is relevant to consider the said issue in the light of judgment of the Honble Apex Court in AIR 1996 SC 484 (B.C.Chaturvedi Vs. Union of India and others). That was the case wherein there was a charge against the delinquent officer of having earned wealth disproportionate to his known source of income which is a criminal misconduct. After conducting the enquiry and considering the Enquiry Officer's report and consulting with the Union Public Service Commission, the petitioner was dismissed from service. There also, when the petitioner approached the Central Administrative Tribunal, the Tribunal after appreciating the evidence has converted the order of dismissal into that of the compulsory retirements.

17. While considering the various issues raised on behalf of the delinquent in that case, the Honble Supreme Court has also decided the question as to whether the Tribunal was justified in interfering with the punishment imposed by the disciplinary authority by referring to various judgments to the effect that it is for disciplinary authority who has to ultimately impose the penalty and normally the Tribunal or High Court should not interfere. The Honble Supreme Court has held that in cases where the punishment shocks the conscience of the High Court or Tribunal, the High Court or Tribunal can either direct the disciplinary authority to reconsider the penalty or to shorten the litigation in exceptional cases and in rare cases impose an appropriate punishment with cogent reasons in support thereof. The Honble Apex Court has laid down the law in that aspect as follows at page No.489:

> "...18) A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

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18. In yet another judgment of the Honble Apex Court in Pritam Singh Vs. Union of India and others reported in JT 2004(7) SC 576 wherein the issue involved was that in respect of a conduct of delinquent in passing on the details of absentation to one of the employees which was neither confidential nor a privileged one for which the punishment of compulsory retirement was ordered and the issue was considered as to whether the High Court was correct in not interfering to the punishment on the basis of disproportionality. While deciding the said issue the Honble Supreme Court has considered the judgment reported in 1997 (7) SCC 634 regarding the scope of judicial review holding that the same is permissible in cases relating to reasonableness, rationality and proportionality. The Supreme Court has ultimately held as follows:

> "We are of the opinion that the instant case is a glaring example of abuse of discretionary power of the disciplinary authority as the punishment of compulsory retirement imposed on the appellant, who has put in 31 years of long service only because he has supplied the details of absentation to one of the employees, which was neither confidential nor a privileged document. In any event, the appellant bona fide believed that he was right in furnishing the details which the employee had right to ask for. In our opinion, this is a fit case where the High Court and the Tribunal should have held that the punishment imposed is vitiated on account of the disproportionality."

19. In another case deciding in Malkiat Singh Vs. State of Panjab and others reported in 1997(7) S.C.C.634 which was relating to the case where the appellant who was a constable was absent on three occasions for which the explanation submitted by him stating that due to sickness of his wife he was unable to attend and the punishment awarded was discharge from service. Considering that the situation wherein the appellant has produced a medical certificate about the sickness of his wife, the Honble Apex Court has held that in such circumstance, it cannot be the deliberate absence and in view of the same the order of discharge was set aside and the respondents were directed to take appellant into service stating that if the appellant absence again for two consecutive days without prior permission, it can be taken to dismiss him from service and holding that the appellant was not entitled to backwages. The Supreme Court has held as follows:

> "... 3) The appellant was appointed on 20.04.1990 and was discharged from service on 22.07.1992 on the ground that he remained absent from duty for more than 1 month 9 days. Another ground was that he was irregular in attending to the duty. So he could not prove himself to be an efficient constable. We had sent for the records which disclose that he was absent on three

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occasions. On the first occasion, when he was called upon to report for duty at 12 noon, he reported on 10.09.1990 and was late by six hours. On the second occasion, he was absent, on 30.06.1991, from night duty. The third occasion was on 24.04.1995. The explanation offered for the absence on the third occasion was that since in his wife's delivery certain complication had arisen, he had to attend to his wife and so he could not be present. The medical certificate in that behalf was produced. In view of the the medical certificate, it cannot be said that he had deliberately absented himself from duty. On the previous two occasions, the absence for one day and in another year for one night cannot be considered to be regular absence so as to reach the conclusion that he had not proved his efficiency. It is true that discipline is required to be maintained. However, absence may sometimes be inevitable. In the facts and circumstances of this case, an opportunity may be given to the appellant to work efficiently to prove his excellence. The order of discharge is set aside. The respondents are directed to take the appellant into service forthwith. If the appellant absents himself again for two consecutive days within one year without prior permission, appropriate action may be taken by dismissing him from service. The appellant, however, is not entitled to back wages."

20. In yet another case, considering the circumstance where a person who has applied for 10 days leave and he has over stayed from service for another 12 days, even though request for extension was rejected the Honble Supreme Court has held that the dismissal of service is harsh since the said conduct is not wilful flouncing of order but it is circumstances force the same to do so. The extracted portion of the judgment of the Honble Apex court reported in Union of India and others Vs. Giriraj Sharma reported in AIR 1994 SC 215 is as follows:

"We are of the opinion that the punishment of dismissal for over staying the period of 12 days in the said circumstances which have not been controvered in the counter is harsh since the circumstances show that it was not his intention to wilfully flout the order, but the circumstances force him to do so. In that view of the matter the learned counsel for the respondent has fairly conceded that it was open to the authorities to visit him with a minor penalty. If they so desired, but a major penalty of dismissal from service was not called for. We agree with this submission."

21. In the judgment of the Supreme Court in Syed Zaheer Hussain Vs Union of India and others reported in AIR 1999 SC 3367, in such circumstances the Honble Supreme Court has substituted the punishment of dismissal holding that it as a harsh by lesser punishment namely reinstatement with withdrawal of 50% of backwages.

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22. Therefore, considering the above said judicial precedents of the Honble Apex Court, the High Court or Tribunal have powers to interfere with the punishment by exercising powers of judicial review in cases where the punishment is disproportionate and shocks the conscience while referring to the nature of charge.

23. In the present case, the charge framed against the petitioner is abstaining for 21 days without obtaining proper leave. By an explanation submitted by the petitioner to the showcause notice of the 5th respondent dated 24.05.2004, as produced by the learned Government Advocate, the petitioner has explained on 25.05.2004 stating that on the particular date he had chest pain and he became unconscious and was admitted in the hospital with the help of his relative and after he came to his consciousness, he sent one of his relatives to inform the same to the office and the concerned relative has not informed the same as promised. He has also admitted that he will not repeat the same in future.

24. In such circumstances, I have considered the said submission of the petitioner in the light of the judgment of the Honble Apex Court and certainly there is no other way except to come to the conclusion that the punishment of the dismissal or the subsequent order of compulsory retirement is disproportionate to the charge and explanation submitted by the petitioner. Certainly, the 5th respondent / Original Authority as also the 4th respondent / the first appellate authority ought to have taken the entire facts and circumstances for imposing the major punishment even though it is true that in the disciplinary force namely the police department, discipline is of utmost importance. Unfortunately a reference to the impugned order of the 5th respondent as also the order of the 4th respondent being the Appellate Authority does not discuss any of the reasons stated by the petitioner informing the reason about his absence for 21 days and also the undertaking given in the explanation by the petitioner that he would not repeat the same in future.

25. In view of the same, I have no hesitation to come to the conclusion that this is the clear instance where the punishment of compulsory retirement is improportionate to the charge, especially in the circumstances that the petitioner has raised a point that he was laid down with a heart ailment, admitted in the hospital in an unconscious stage and he was under the belief that one of the relative who has promised to inform the department would have done the same and therefore it has to be taken that the absence is not wilful and that aspect has not been considered while imposing the major punishment.

26. In view of the same the impugned order passed by the 4th respondent dated 12.07.2004 by imposing the punishment of compulsory retirement is set aside and the matter is remitted back to the 4th respondent for the purpose of deciding the appropriate punishment to the petitioner. Considering the above facts and circumstances the 4th

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respondent is directed to consider the explanation as also the undertaking by the petitioner and pass appropriate orders regarding the punishment proportionate to the charges framed against the petitioner and such order shall be passed within a period of four weeks from the date of receipt of a copy of this order.

Hence, the writ petition stands allowed in the above terms. No Costs. Consequently, W.P.M.Ps. are closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

nbj

To

1. The Secretary,
   Government of Tamil Nadu,
   Home (Pol.VI) Department,
   Fort St.George,
   Secretariat, Chennai 9.

2. The Director General of Police,
   Chennai 4.

3. The Additional Director General of Police (L&O)
   Chennai 4.

4. The Deputy Inspector General of Police,
   Vellore Range, Vellore.

5. The Superintendent of Police,
   Vellore District, Vellore.

1 cc To Mr.S.Ilamvaludhi, Advocate, SR.40860.
1 cc To The Government Pleader, SR.41227.

W.P.No.24701 of 2006
& W.P.M.P.Nos.1 & 2 of 2006

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